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No. 82-479

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR, ET AL., PETITIONERS

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court erred in requiring the State of Indiana to pay the full cost of the remedy for the interdistrict violation for which it was found liable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 677 F.2d 1185. The opinion of the district court (Pet. App. A39-A45) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1982. The petition for a writ of certiorari was filed on September 17, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The United States filed this school desegregation case in May, 1968, against the Board of School Commissioners of the City of Indianapolis, alleging that the Indianapolis public school system (IPS) was racially segregated. After the

district court held that IPS was unlawfully segregated,[1] a class of black IPS students was permitted to intervene as plaintiffs and to file an amended complaint naming outlying school districts, the Housing Authority of the City of Indianapolis, the Metropolitan Development Authority, and the State of Indiana as additional defendants.[2]

Following various trials and appeals,[3] the district court found that the State of Indiana acted "with the racially

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[1] *United States* v. *Board of School Commissioners of Indianapolis*, 332 F. Supp. 655 (S.D. Ind. 1971), aff'd, 474 F.2d 81 (7th Cir.), cert. denied, 413 U.S. 920 (1973).

[2] On July 20, 1973, the court held that "the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts * * *" (368 F. Supp. 1191, 1205 (S.D. Ind.)). In response to the court's directive (*id.* at 1224-1227), the State General Assembly enacted the "Indiana Transfer Act," Pub. L. No. 94, 1974 Ind. Acts 345 (Ind. Code Ann. 20-8.1-6.5-1 (Burns)) which became effective February 20, 1974. That statute, which apportions the cost of interdistrict transfers between the transferor school corporation and the state, applies only after a court has made the following findings and conclusions and all appeals have been exhausted (Pet. App. A-3 to A-4; 456 F. Supp. 188, 191 (S.D. Ind. 1978)):

> (a) A transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders;
>
> (b) A unitary school system within the meaning of such amendments cannot be implemented within the boundaries of the transferor corporation; and
>
> (c) The Fourteenth Amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

[3] Intervening decisions by the various courts in this case are as follows: 368 F. Supp. 1191 (S.D. Ind. 1973), aff'd in part, rev'd in part, and remanded, 503 F.2d 68 (7th Cir. 1974), cert. denied, 421 U.S. 929 (1975); 419 F. Supp. 180 (S.D. Ind. 1975), aff'd, 541 F.2d 1211 (7th Cir. 1976), vacated and remanded, 429 U.S. 1068 (1977), on remand, 573 F.2d 400 (7th Cir. 1978).

discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County" (456 F. Supp. at 188).[4] The court then ordered that black students from IPS be transferred into the suburban school districts. *Ibid.*, aff'd, 637 F.2d 1101 (7th Cir.), cert. denied, 449 U.S. 838 (1980).

Prior to the beginning of the 1981-1982 school year, several of the suburban school districts receiving black students from IPS petitioned the district court to supplement its judgment, inter alia, to assess the entire cost of the interdistrict remedy against the State. The court granted the petition, concluding (Pet. App. A39-A45) that because the State is solely responsible for the interdistrict violation, it should be required to pay the costs of the interdistrict remedy. The district court's financing plan (*id.* at A22-A36) requires the State to pay transfer tuition for IPS students' transportation costs (including transportation for extracurricular activities), other costs incurred by the receiving districts in connection with implementing the desegregation plan, and the increased operational costs of IPS resulting from loss of the transferred students. The plan provides that payments shall first be made from unappropriated funds and shall not reduce payments that any school corporation is otherwise entitled to receive under applicable statutes (*id.* at A33).[5]

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[4]The principal basis for the district court's finding was a 1969 statute, known as "Uni-Gov" (Ind. Code Ann. § 36-3-1-1 *et seq.* (Burns Repl. 1981)), which expanded the boundaries of the city of Indianapolis to encompass all of Marion County but did not similarly expand the boundaries of IPS.

[5]The state previously had been ordered to pay for certain ancillary relief, e.g., in-service training for teachers (506 F. Supp. 657, 674 S.D. Ind. 1979), and the court of appeals affirmed. 637 F.2d 1101, 1116 (7th Cir. 1980).

The court of appeals affirmed (Pet. App. A1-A19), rejecting the state's contention that the district court's order specifying the source of funding constituted an "improper invasion of its sovereignty" (*id.* at A10). The panel majority ruled that this provision of the order was necessary as an interim measure since the legislature had already adjourned for the fiscal year and would not reconvene in time to appropriate funds for the beginning of the school year (*ibid.*). Finally, the court held that the district court had not abused its discretion in ruling that no portion of the cost of the interdistrict remedy should be funded out of appropriations ordinarily paid to IPS and the suburban districts; it reasoned that the school districts subject to the court's order would be "further victimized" were they required "to pay the cost of remedying their own injuries" *(ibid.)*.[6]

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[6]The court of appeals also held the Indiana Transfer Act inapplicable to this case since it is triggered only in those situations where, inter alia, a constitutional violation is committed by the transferor school district (here, IPS) which can be remedied only through interdistrict transfer of students. Since the district court had determined that only the state was responsible for the interdistrict violation, the Act was held inapplicable. The court further held that, even if the Act applied, neither the Tenth Amendment nor principles of equity or federalism prohibited the district court from rejecting the state's decision to require IPS to help defray the cost of remedying the interdistrict violation (Pet. App. A5-A6).

Finally, the court addressed the state's argument, not pursued by the State in its petition, that the district court erred in requiring the State to reimburse IPS for the financial loss occasioned by the transfer of a large number of its students and to pay the cost of transportation for extracurricular activities of the transferred students. The court concluded (1) that the record supported the factual finding that IPS would incur a loss as a consequence of the interdistrict remedy, and (2) that the provision of extracurricular transportation was necessary to the success of the plan. It thus found no abuse of discretion in inclusion of these elements in the district court's order.

Judge Posner dissented, on the ground that the financing plan was not an appropriate exercise of the district court's equity power (Pet. App. A11-A19). He reasoned that the State, like any unsuccessful litigant, should be allowed to determine how to shoulder the cost of its obligation under the remedial decree and that, unless it defaults on its obligation, or attempts to discharge its responsibilities in an unlawful manner, the federal courts have no occasion to intervene (*id.* at A14-A15). He further stated that although the suburban districts were absolved of legal liability for the interdistrict violation, their complicity in the acts resulting in the violation rendered their invocation of the court's equitable jurisdiction an "effrontery" (*id.* at A19).[7]

DISCUSSION

The questions presented in this case relate exclusively to a dispute among the state defendants concerning who will bear the financial burden of the interdistrict remedy. The district court found the State responsible for the segregation of Marion County schools and ordered the implementation of a desegregation plan adequate to remedy the interdistrict violation. The finding of liability and the remedy were upheld on appeal. So long as defendants lawfully and in good faith comply with the court's interdistrict

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[7]Judge Posner did not suggest that the decision here conflicts with that of any other court of appeals (see Pet. App. A-11) or with any decision of this Court (see *id.* at A-19).

desegregation plan, the interest of the United States in the matter is at an end. Accordingly, we express no view on the merits of the issues raised in the petition for a writ of certiorari.

Respectfully submitted.

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